

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF MINNESOTA**

In re:	)	Chapter 11
	)	
DISTRIBUTION DYNAMICS, INC., et al.)	)	Bankruptcy No. 04-32489 DDO
	)	(Jointly Administered)
Debtors.	)	

---

**NOTICE OF MOTION OF CENTERPOINT REALTY SERVICES CORPORATION  
FOR RELIEF FROM AUTOMATIC STAY TO EXERCISE SETOFF**

To: All parties in interest specified in Local Rule 1204(a).

1. CenterPoint Realty Services Corporation (“CenterPoint”) moves the Court for the relief requested in its Motion and gives notice of hearing.

2. The Court will hold a hearing on this motion on September 22, 2004 at 9:30 a.m., or as soon thereafter as counsel can be heard, in court room 228B, 200 Federal Building, 316 North Robert Street, St. Paul, MN.

3. Any response to this motion must be filed and delivered not later than 9:30 a.m. on the 21st day of September, 2004 which is 24 hours before the time set for the hearing, or filed and served by mail no later than the 17th day of September, 2004 which is three days before the time set for the hearing, all in accordance with Local Rule 1203(b).

UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE  
COURT MAY GRANT THE MOTION WITHOUT A HEARING.

Dated: September 1, 2004

WAGNER, FALCONER & JUDD, LTD.

/s/Norman I. Taple

Norman I. Taple (MN ID #0331090)

3500 IDS Center

80 South Eighth Street

Minneapolis, MN 55402-2113

Phone: (612) 339-1421

And

*Of Counsel:*

Michael Weininger (2966271)

Weinberg Richmond LLP

333 West Wacker Drive, Suite 1800

Chicago, IL 60606

Phone: (312) 807-3800

ATTORNEYS FOR CENTERPOINT REALTY  
SERVICES CORPORATION

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF MINNESOTA**

In re:	) Chapter 11
	)
DISTRIBUTION DYNAMICS, INC., et al., <sup>1</sup>	) Bky - 04-32489
	)
Debtors.	) (Jointly Administered)

**MOTION OF CENTERPOINT REALTY SERVICES CORPORATION  
FOR RELIEF FROM THE AUTOMATIC STAY TO EXERCISE SETOFF**

CenterPoint Realty Services Corporation (“CRSC”) by its counsel states the following in support of its Motion for Relief from the Automatic Stay to Exercise Setoff:

**Summary of Requested Relief**

By this Motion, CRSC requests relief from the automatic stay imposed by §362(a)(7) to allow it, pursuant to § 553, to setoff the security deposit held by CRSC against the due and owing pre-petition and post-petition lease rejection lease payments for improved real property leased by the Debtor in West Allis, Wisconsin.

**Jurisdiction, Venue and Authority**

This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(G). Venue in this district is proper pursuant to 28 U.S.C. § 1409. This Court has the power to modify the automatic stay pursuant to 11 U.S.C. § 362(d).

---

<sup>1</sup> The Debtors consist of Distribution Dynamics, Inc., Distribution Dynamics Holdings, Inc., Pro Fasteners, Northwestern Company, Rainbow Fastener Company.

## **MEMORANDUM**

### **Background Facts**

1. On April 26, 2004 (the “Petition Date”), Distribution Dynamics, Inc. (“Debtor”) and related entities (collectively the “Debtors”) commenced their respective reorganization cases by filing voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. The Debtors operate their estates as debtors-in-possession pursuant to 11 U.S.C. § 1108. The Debtors’ Chapter 11 cases have been jointly administered.

2. CRSC is the Landlord and Debtor the Tenant under that certain Industrial Building Lease dated as of July, 1998 (the “Lease”), for 113,620 square feet of space in a building located at 70<sup>th</sup> & Washington Street, West Allis, Wisconsin (the “Premises”).

3. This Court entered an order on June 21, 2004, authorizing Debtor to reject “non designated contracts”, defined to include the Lease for the Premises. The order further provided that rejection was effective the date Debtor delivered a written notice to CRSC of such rejection.

4. Debtor provided CRSC with notice of rejection on or about July 13, 2004. A copy of the notice is attached as **Exhibit 1**.

5. As of the Petition Date, the outstanding balance of unpaid rent under the Lease was \$106,806.23.

6. Under the Lease CRSC holds \$112,000.00 as a security deposit for Debtor’s rent obligations. The relevant Lease provisions are attached as **Exhibit 2**. The entire Lease is attached as an exhibit to CRSC’s Proof of Claim filed along with this Motion.

### **Argument**

7. Specifically, § 362(a)(7) provides that the commencement of the case operates as a stay of, “[t]he set off of any debt owing to the debtor that arose before the commence of the case

under this title against any claim against the debtor.” Pursuant to § 362(d)(1), a party in interest may seek relief from the automatic stay for cause. As set forth below, CRSC has a valid and enforceable right of setoff pursuant to § 553 and applicable non-bankruptcy law. The rights of parties in real estate leases are governed by state laws. Johnson v. First National Bank, 719 F.2d 270 (8<sup>th</sup> Cir. 1983, cert. denied). Consequently, cause exists under § 362(d)(1) to modify the automatic stay to allow CRSC to effect the setoff. In re Orlinski, 140 B.R. 600, 604 (Bankr. S.D. Ga. 1991) (finding that movant’s right of setoff constituted cause for relief from the stay to permit the setoff).

8. “The right of setoff allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding ‘the absurdity of making A pay B when B owes A’.” Citizens Bank of Maryland v. Strumpf, 516 U.S. 16, 18 (1995). While the Bankruptcy Code does not create a federal right of setoff, it does preserve whatever such right exists under non-bankruptcy law. Id. At 18.

9. Setoff is governed by § 553. Specifically, § 553(a) provides in pertinent part:

“Except as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case (...) against a claim of such creditor against the debtor that arose before the commencement of the case.”

Courts have interpreted this provision as creating the following requirements a creditor must demonstrate before he may effect a setoff:

- (i) the debtor must owe a debt to the creditor which arose pre-petition;
- (ii) the debtor must have a claim against the creditor which arose pre-petition;
- (iii) the claim and the debt must be mutual; and

- (iv) the claim and debt are each valid and enforceable.

See, for example, Ramirez v. Minnesota Department of Revenue ( *In re Ramirez* ) 266 B.R.441,443 (Bk. D. Minn. 2001) ); St. Francis Physician Network, Inc. v. Rush Prudential HMO, Inc. (*In re St. Francis Physician Network, Inc.*), 213 B.R. 710, 715 (Bankr. N.D. Ill. 1997).

10. The Lease provides for the application of Wisconsin law (§ 32.3). Wisconsin law recognizes the right of setoff. In re Zienel Furniture, Inc., 13 B.R. 264, 1981 Bankr. Lexis 3193 (U.S.B.C. ED. Wisc.).

11. Under the foregoing standard, CRSC's claim for the due and owing pre-petition payments under the Lease qualifies for setoff against the Debtor's claims for the security deposit. Each party's claim arose pre-petition. The claims are between the same parties, standing in the same capacity, and the same kind or quality. See, In re Lakeside Cmty. Hosp., 151 B.R. at 891. Finally, the mutual claims are valid and enforceable as they arose from a valid and enforceable contract.

12. In addition, the lease rejection damages are secured to the extent of the remainder of the security deposit not setoff against the pre-petition rent. See, cf. In re Zienel Furniture, Inc., 13 B.R. at 266.

13. Accordingly, the automatic stay imposed by §362(a)(7) should be modified to allow CRSC to, pursuant to § 553, to setoff the security deposit against due and owing pre-petition lease payments and to apply the balance to CRSC's lease rejection damages.

WHEREFORE, CRSC requests an Order modifying the automatic stay to permit CRSC to setoff the debt owed by Debtor to CRSC and for such further relief as this Court deems just.

Dated: September 1, 2004

**CENTERPOINT REALTY SERVICES CORPORATION**

By: /s/ Norman I. Taple \_\_\_\_\_

Norman I. Taple (MN ID #0331090)  
Wagner, Falconer & Judd, Ltd.  
3500 IDS Center  
80 South Eighth Street  
Minneapolis, MN 55402-2113  
(612) 339-1421

And

*Of Counsel:*

Michael Weininger (2966271)  
Weinberg Richmond LLP  
333 W. Wacker Dr., Suite 1800  
Chicago, IL 60606  
(312) 807-3800

Attorneys for CenterPoint Realty Services  
Corporation

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF MINNESOTA**

04 SEP -3 AM 8:35

In re:

)  
)  
DISTRIBUTION DYNAMICS, INC., et al.)  
)  
Debtors. )

Chapter 11  
U.S. BANKRUPTCY COURT  
ST. PAUL, MN  
Bankruptcy No. 04-32489 DDO  
(Jointly Administered)

---

**AFFIDAVIT OF NORMAN I. TAPLE IN SUPPORT OF  
CENTERPOINT REALTY SERVICES CORPORATION'S MOTION  
FOR RELIEF FROM AUTOMATIC STAY TO EXERCISE SETOFF**

STATE OF MINNESOTA )

) ss:

COUNTY OF HENNEPIN)

Norman I. Taple, being first duly sworn under oath, deposes and states:

1. He is an attorney with the law firm of Wagner, Falconer & Judd, Ltd., 3500 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402, which firm of attorneys represents CenterPoint Realty Service Corporation ("Creditor").

2. CenterPoint Realty is the Creditor and Landlord and Distribution Dynamics, Inc. is the Debtor and Tenant under that certain Industrial Building Lease dated as of July, 1998 (the "Lease"), for 113,620 square feet of space located in a building located at 70th and Washington Street, West Allis, Wisconsin.

3. This Court entered an Order on June 21, 2004, authorizing Debtor to reject "non-designated contracts", defined to include the Lease for the Premises. The Order provided that rejection was effective the date Debtor delivered a written notice to Creditor of such rejection.

4. Debtor provided Creditor with notice of rejection on or about July 13, 2004.



5. Debtor owes an outstanding balance of unpaid rent under the Lease in the amount of One Hundred Six Thousand Eight Hundred Six and 23/100 Dollars (\$106,806.23) to Creditor, which arose pre-petition.

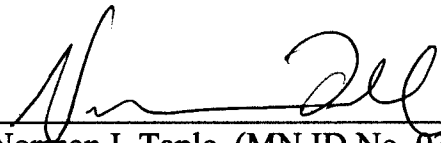
6. Under the Lease, Debtor has a claim against the Creditor in the amount of One Hundred Twelve Thousand and no/100 Dollars (\$112,000.00), which is a security deposit for Debtor's rent obligations that arose pre-petition.

7. The claim and debt are mutual, valid, and enforceable.

8. To the best of your affiant's knowledge, Creditor has a good and valid claim against the Debtor, which pursuant to 11 U.S.C. § 553, Creditor should be allowed to set off the security deposit against due and owing pre-petition lease payments and to apply the balance to Creditor's lease rejection damages.

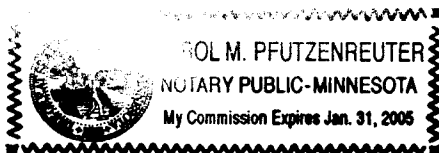
9. This is a matter that should be submitted to the Court for prompt disposition.

FURTHER AFFIANT SAYETH NOT.

  
\_\_\_\_\_  
Norman I. Taple (MN ID No. 0331090)

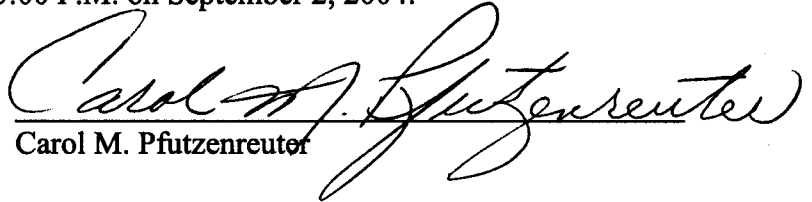
Subscribed and sworn to before me this  
2nd day of September, 2004.

  
\_\_\_\_\_  
Notary Public



**CERTIFICATE OF SERVICE**

Under penalties of perjury as provided in 28 U.S.C. ' 1746, the undersigned certifies that he/she caused a copy of the foregoing **Affidavit of Norman I. Taple in Support of CenterPoint Realty Services Corporation's Motion For Relief From The Automatic Stay To Exercise Setoff** to be served on those individuals listed on the attached Service List by depositing same in the U. S. mail at before 5:00 P.M. on September 2, 2004.

  
Carol M. Pfutzenreuter

## **SERVICE LIST**

<p><b><u>Counsel to the Debtors</u></b></p> <p>Mark J. Kalla, Esq. Chris Lenhart, Esq. DORSEY &amp; WHITNEY LLP 50 South Sixth Street, Suite 1500 Minneapolis, MN 55402</p>	<p><b><u>Counsel to the Agent for the Lenders</u></b></p> <p>Carl T. Anderson, Esq. George Hawley, Esq. PAUL, HASTINGS, JANOFSKY &amp; WALKER 515 S. Flower St., 25<sup>th</sup> Floor Los Angeles, CA 90071</p> <p>And</p>
<p><b><u>Office of the United States Trustee</u></b></p> <p>Sarah J. Wencil, Esq. 1015 U.S. Courthouse 300 South Fourth Street Minneapolis, MN 55415</p>	<p>Thomas J. Lallier, Esq. FOLEY &amp; MANSFIELD P.L.L.P. 250 Marquette Ave., Suite 1200 Minneapolis, MN 55403</p>
<p><b><u>Counsel to the Committee of Unsecured Creditors</u></b></p> <p>Michael B. Fisco, Esq. FAEGRE &amp; BENSON LLP 2200 Wells Fargo Center 90 South Seventh Street Minneapolis, MN 55402</p>	

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF MINNESOTA**

In re:	)	Chapter 11
	)	
DISTRIBUTION DYNAMICS, INC., et al.)	)	Bankruptcy No. 04-32489 DDO
	)	(Jointly Administered)
Debtors.	)	

---

**ORDER GRANTING RELIEF FROM AUTOMATIC STAY**

CenterPoint Realty Services Corporation's Motion for Order for Relief From the Automatic Stay came before the undersigned on September 22, 2004. Norman I. Taple appeared on behalf of CenterPoint Realty Services. Other appearances are noted on the record.

Based on the argument of counsel, all of the files, records and proceedings herein,

**IT IS HEREBY ORDERED:**

The automatic stay in the above-referenced matter is terminated with respect to CenterPoint Realty Services Corporation, and CenterPoint Realty Services Corporation may set off the debt owed by the debtor to CenterPoint Realty Services Corporation upon or take whatever action is necessary.

Dated: \_\_\_\_\_

**BY THE COURT**

---

Dennis D. O'Brien  
Judge of United States Bankruptcy Court